

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Krank Construction LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:42 I/II Employer/employee relationship
RSA 275:43 I unpaid wages

Employer: Krank Construction Inc., 46 Webster St., Manchester, NH 03104

Date of Hearing: March 9, 2015

Case No.: 49664

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$21,900.00 in unpaid wages for hours worked on projects for the employer. He states he is due the following:

- Campo Restaurant \$5,200
- USA Ultimate Sports Academy \$6,000
- Lot 1 \$1,500
- Lot 4 \$1,500
- Lot 5 \$7,700

The claimant has known Mr. Tamzarian for about twenty years. Mr. Tamzarian approached him to help with the business. He testified he was self-employed for years prior to working for Mr. Tamzarian, but that he was at all relevant times an employee of Krank Construction LLC.

The claimant presented copies of invoices for materials, check payment to vendors and other miscellaneous documents related to the projects for which he seeks wages.

He stated he emailed copies of all the outstanding invoices for wages due to him to Mr. Tamzarian. He also submitted paper copies on his last day of employment, to which he claims Mr. Tamzarian replied, "Sue me."

Mr. Tamzarian argues the claimant has never been his employee, but a subcontractor. The claimant invoiced for his work on projects.

He also argues he does not have copies of any of the invoices the claimant states he submitted. Email copies may exist somewhere, but he does not have them. The claimant is not due any additional compensation.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee or an independent contractor. RSA 275:42 II defines "employee" as, "means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

It is noted that on its face, the appearance of this relationship is one of a prime contractor and subcontractor. The claimant meets all but one of the criteria under RSA 275:42 II to be exempt from the definition of employee. However, the claimant does not meet *all* of the criteria set forth in the statute to be exempted from the definition of employee under this jurisdiction.

The Hearing Officer finds that the claimant was an employee of an employer, not an independent contractor, because the claimant does not meet the criterion in (f). Both parties acknowledge the claimant was not responsible for the satisfactory completion of work, and he could not be held contractually responsible for failure to complete the work.

The claimant presented a multitude of invoices for materials, check payment to vendors and other miscellaneous documents related to the projects for which he seeks wages.

The question at issue is not whether or not the claimant had been involved with these projects of the employer, but whether or not he had been paid all wages due for the work he claims to have performed on these projects.

The claimant failed to provide any documentation to show he worked all the hours claimed.

The employer provided documentation to show that the invoices he had received from the claimant had been paid in full.

The Hearing Officer finds that the claimant testified as credibly, not more credibly, than the employer. The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he was not paid for all hours worked. The Hearing Officer finds that the claimant failed to meet that burden of proof as his story is only as credible as, not more credible than, the employer's. The claimant, therefore, fails to prove by a preponderance of the evidence that he is owed the claimed wages.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed wages, it is hereby ruled that the Wage Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 18, 2015

MJD/kdc